STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Borello, PJ, White and Smolenski, JJ.

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THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

No.126067

vs.

DAVID WILLIAM SCHAEFER,
Defendant-Appellee.

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Lower Court No. 02-004291
COA No. 245175

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# APPELLANT'S BRIEF ON APPEAL
***ORAL ARGUMENT REQUESTED***

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## Summary of Argument

The offense of "OUIL causing death" is committed when, while violating MCL 257.625(1); that is, operating a motor vehicle "while intoxicated," an offense that requires no proof regarding the manner of operation of the vehicle, a person "by operation of that motor vehicle causes the death" of some other person. By a common understanding of the ordinary terms employed, the statute refers to "operating while intoxicated," not "intoxicated operating," or "operating in an intoxicated manner." That one has violated the prohibition in subsection (1) is sufficient if death is caused by the operation of the vehicle as a cause-in-fact, and that result is not remote from the cause, and no other cause intervenes that amounts to a superseding cause.

## Statement of the Question

I.

**One who while intoxicated "operates a motor vehicle" and "by operation of that motor vehicle causes the death" of some person, commits a felony. "Cause" is a legal term meaning that the act must be the cause-in-fact of the result, that the result must not be remote, and that no superceding cause may have intervened. Does the statute require that any "change in the manner of driving" brought on by intoxication cause the death?**

**The People answer: NO**

**Defendant answers: YES**

## Statement of Facts

The defendant was driving while intoxicated, and the passenger in his vehicle was killed when the vehicle struck the curb and flipped over while exiting the freeway. An eyewitness said that defendant had been "tailgating" the witness's vehicle, then another vehicle, on the freeway before attempting to exit. A defense expert witness testified that the exit ramp was safe for thirty mile per hour speeds and under, and that the curb was dangerous. He testified he would expect that since its completion of the curb in 1966 there would have been "a number of people who got into problems getting off the ramp and striking the curb and having problems," including rollovers.[1] He was not aware that in at least the previous 21 years no one had rolled their vehicle on that exit.[2] He would have expected there had been some.[3] Rather than reading the standard instruction, CJI2d 15.11, the trial judge simply read the statute to the jury, to which defense counsel objected. When the jury asked for further instructions, the trial judge again read the statute; defense counsel objected.[4] The jury convicted; on the second count of manslaughter, the jury returned a verdict of negligent homicide.[5] The majority of the panel in the Court of Appeals reversed

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[1] 28A.

[2] 29A.

[3] 30A.

[4] 51A.

[5] The jury was instructed on the meaning of both gross negligence and ordinary negligence, and thus, by the negligent homicide verdict, found that the defendant negligently operated the motor vehicle, and in so doing caused the victim's death. See 35A-41A; 45-46A.

on the ground that the jury had not been told, as set out in the standard jury instruction, that it was required to find that "the defendant's *intoxicated* driving was a substantial cause of the victim's death." The court's instruction "thus failed to cover the causation element as set forth in *Lardie, supra* (and in CJI2d 15.11)."[6]

[6] 11A.

## Argument

## I.

**One who while intoxicated "operates a motor vehicle" and "by operation of that motor vehicle causes the death" of some person, commits a felony. "Cause" is a legal term meaning that the act must be the cause-in-fact of the result, that the result must not be remote, and that no superceding cause may have intervened. The statute does not require that any "change in the manner of driving" brought on by intoxication cause the death.**

### Introduction: The Task At Hand

The Michigan Legislature has provided that no person may operate a motor vehicle on a highway or other place open to the general public or generally accessible to motor vehicles "while intoxicated."[7] If a person violates this prohibition–operates a motor vehicle while intoxicated–"and by *operation of that motor vehicle causes the death*" of some person,[8] the violator is guilty of a 15-year felony.[9] What does this mean? In *People v Lardie*[10] this court said that though "there is no requirement that the people prove gross negligence or negligence,"[11] the statute requires that the prosecution prove that defendant's decision to drive while intoxicated produced a "*change in that driver's operation of the*

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[7] "Operating while intoxicated" is defined in the statute. MCL 257.625(1)(a) and (b).

[8] MCL 257.625(4).

[9] Absent circumstances that aggravate the penalty.

[10] *People v Lardie*, 452 Mich 231 (1996).

[11] *Lardie*, at 249.

*vehicle*"–though not resulting in either grossly negligent nor negligent operation of the vehicle–that caused the death of the victim.[12] What does *this* mean? How does one identify a "change in the manner of the operation of the vehicle" that does not result in even negligent driving? Does this square with the language of the statute? And how does one approach the task of ascertaining statutory meaning?

It is often said that the "goal in construing a statute is to ascertain and give effect to the intent of the Legislature."[13] But by this it is meant that the intent of the legislature manifested through its objective expression–the text of the statute–must be discovered. As Justice Holmes concisely put it, "We do not inquire what the legislature meant; we only ask what the statute means."[14] This court has itself repeatedly said that "[I]f the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written. ...In other words, when statutory language is unambiguous, judicial construction is not required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed."[15] And in considering "what the statute means," the use by the legislature of terms with an understood technical or *legal*

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[12] *Lardie*, at 258. Put another way, "the driver's *intoxication,* rather than the mere operation of the vehicle, must be the cause of the victim's death." *Lardie*, at 257.

[13] See e.g. *People v Pasha,* 466 Mich 378 (2002); *People v Weeder,* 469 Mich 493, 497 (\2004), among a multitude of others.

[14] Holmes, *The Theory of Legal Interpretation,* 12 Harv.L.Rev. 417, 419 (1898).

[15] *People v. Weeder,* 469 Mich 493, 497 (2004).

import is considered an adoption by the legislature of that understood meaning.[16] Ordinary terms, on the other hand, must be given their ordinary meaning, that meaning they would evoke in the common mind, under established principles of English usage.[17] In sum, what is sought when a statute is construed is not the "subjective" legislative intent, but "a sort of 'objectified' intent–the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[18]

Here, then, the task at hand is to determine the meaning of an ordinary word or phrase–"operation of motor vehicle"–as well as a term of legal art–causation–as they are used in MCL 257.625.

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[16] See e.g. *Nugent v Ashcroft*, 367 F3d 16, 170 (CA 3, 2004)("Where federal criminal statutes use words of established meaning without further elaboration, courts typically give those terms their common law definition. *Moskal v. United States,* 498 U.S. 103, 114, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990); *Gilbert v. United States,* 370 U.S. 650, 655, 82 S.Ct. 1399, 8 L.Ed.2d 750 (1962)"); *Silver Creek Drain Dist. v. Extrusions Div., Inc.* 468 Mich 367, 376 (2003)("words that fall into that category ... as technical legal terms or phrases of art in the law... are to be given the meaning that those sophisticated in the law gave them at the time of enactment")."

[17] See *Burns v. Alcala*, 420 US 575, 580-581, 95 S Ct 1180, 1184, 43 L.Ed.2d 469 (1975); *Girlish v. Acme Precision Products, Inc.*, 404 Mich 371 (1978).

[18] Scalia, *A Matter of Interpretation* (Princeton University Press, 1997), p.17.

## Discussion

### A. The Lardie Opinions Parsed

The salient points of the majority *Lardie* opinion's exegesis of the statute are:

- The culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive.[19]

- Under the plain language of [the statute], there is no requirement that the people prove gross negligence or negligence in order to prosecute someone for causing another person's death by operating a vehicle while intoxicated.[20]

- The Legislature intended to deter drunk driving and, therefore, must have intended that the people prove that the driver voluntarily, i.e., *"willing[ly],"* decided to commit this culpable act. [21]

- The Legislature must reasonably have intended that the people prove a mens rea by demonstrating that the defendant purposefully drove while intoxicated or, in other words, that he had the general intent to perform the wrongful act.[22]

- In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would

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[19] *Lardie*, at 245.

[20] *Lardie*, at 249.

[21] *Lardie*, at 252-253.

[22] *Lardie*, at 255.

produce an absurd result by divorcing the defendant's fault from the resulting injury.[23]

- The statute may easily support the interpretation that the driver's *intoxication,* rather than the mere operation of the vehicle, must be the cause of the victim's death.[24]

- An interpretation that the statute refers to operation of the vehicle while intoxicated without a requirement that the manner of driving was affected by the intoxication would not directly further the Legislature's purpose of reducing fatalities because there is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death.[25]

- The people thus must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. The elements of the offense are that the People must prove that (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death.[26]

Justice Weaver, concurring, disagreed that the statute refers in any manner to some demonstration that the fact of intoxication affected the manner of driving–and the People also are at something of a loss to understand just what this means, in conjunction with the

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[23] *Lardie*, at 257.

[24] *Lardie*, at 257.

[25] *Lardie*, at 258.

[26] *Lardie*, at 258-260.

holding that neither negligence nor gross negligence in the manner of driving must be shown–stating her view that "[T]he defendant's manner of driving, and any change in that manner attributable to the defendant's intoxicated state, is not an element of the statute. ...the causation element requires the people to prove that the death resulted from the defendant's commission of the culpable act prohibited by the statute, which occurs when 'a person becomes intoxicated and then decides to drive,' and actually does so."[27]

**B. The Statute Parsed**

**(1) "by operation of that motor vehicle"**

Justice Weaver's analysis in *Lardie* of the meaning of this phrase has the better of the argument, for the explication by the majority of the meaning of the statute not only does violence to the ordinary meaning of the terms employed, as placed in the statute, but achieves a result that is difficult, at best, to comprehend. Taking the latter point first, to construe the statute–quite correctly–as containing no element of either gross negligence or negligence, so that the People do not have to prove that defendant's "negligent manner of driving" caused the death of some person, or that defendant's "grossly negligent manner of driving" caused the death of some person, while at the same time holding that *some* effect on the manner of driving was caused by the fact of intoxication of the driver-defendant, which in turn caused the death of someone, is not understandable. *What* effect must the intoxication have had on the manner of driving, if not one that resulted in either gross

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[27] *Lardie*, at 269.

negligence or ordinary negligence in the operation of the vehicle? The question has no answer, rendering the opinion internally inconsistent, and this is because, to return to the first point, this construction does violence to the ordinary meaning of the terms employed in the statute.

The statute first creates the offense of driving while intoxicated, defining that term. No person may operate a motor vehicle if the person is "operating while intoxicated," which means he or she is either "under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance," or has a specified blood-alcohol content. Though the manner of the operation of the vehicle may be circumstantial proof of operating while intoxicated, the statute does *not* require that the manner of driving be shown to have been altered in any way by the intoxicated state of the driver. The statute prohibits not "intoxicated operating," but "operating *while* intoxicated." The statute then provides that if one violates this provision, "operating while intoxicated," and when "operating while intoxicated" by "*the operation*" of that vehicle "causes the death" of another person, the driver is guilty of a felony. Put another way, if one violates a provision of the statute which contains no requirement of proof of operation of the vehicle in any particular manner–operates while intoxicated–and when operating the motor vehicle causes someone's death, the crime is complete. It is "by operation" of the motor vehicle that death must be caused. The statute does *not* provide, as it might easily have done, that death must be caused by the "intoxicated manner" of driving. Rather, the only requirement of the statute

as to the operation of the vehicle is that the driver *be* intoxicated, and then the "cause" of the victim's death" must be "the operation" of the vehicle, operation meaning, in its ordinary sense, "to perform a function; to exert power or influence" over.[28] If the defendant was, then, "operating a motor vehicle while intoxicated"; that is, performing the function of driving the vehicle and doing so while under the influence, and by the "performance of the function" of driving–not in any particular manner affected by the intoxication–caused the death of some person, the statute is satisfied.

Decisions from states with similar statutory language confirm that the statute means causing death by operating while intoxicated, not causing death from intoxicated driving (a construction which again, the language simply will not bear). For example, the Wisconsin Supreme Court has construed that state's statute providing that it is a felony if one "causes the death of another by operation or handling of a vehicle...while under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance."[29] That court found that the offense contains only two elements: 1)causing the death of another person by the operation of a vehicle and 2)being under the influence at the time.[30] The statute, said the court,

> ...requires that the prosecution prove and the jury find beyond a reasonable doubt a causal connection between the defendant's

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[28] *Merriam-Webster Dictionary.*

[29] Wisconsin Stat. § 940.09(1)(a).

[30] *State v Caibaiosai*, 363 NW2d 574 (Wisc, 1985).

> unlawful conduct, operation of a motor vehicle while intoxicated, and the victim's death. The statute does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death....The legislature has determined that this activity is so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death.
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> ***
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> The substantial factor in the cause of the death is the cause in fact in the operation of the vehicle while intoxicated.[31]

Similarly, the Washington Supreme Court has held its statute providing that "when the death of any person shall ensue within one year as a proximate result of injury received by the operation of any vehicle by any person while under the influence of or affected by intoxicating liquor or narcotic drugs...." contains no requirement that the prosecution prove any causal link between the intoxication and the death.[32]

**(2) "causes the death of another person": cause-in-fact and proximate or legal cause**

All homicide statutes in Michigan require causation, including those that do not specifically use the term, such as murder and manslaughter. None of these statutes defines the causation element which is, in truth, common to each ( not necessarily shared is that conduct which *supplies* the cause, which may, for example, be an act with intent to kill, with

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[31] 363 NW2d at 594.

[32] *State v Rivas*, 896 P2d 57 (Wash, 1995). See also *Florida v Hubbard*, 751 So 2d 552 (Fla, 1999).

intent to do great bodily harm, with wanton and wilful disregard of the consequences, with gross negligence, with ordinary negligence, or by operating a motor vehicle while intoxicated–or impaired, or with a suspended or revoked license). The question which caused controversy in Michigan law for some years was whether, in a vehicular manslaughter or negligent homicide prosecution, the grossly negligent or negligent act of the accused was required to be the "sole" or "only" "proximate cause" of the death of the victim, ordinarily expressed as whether the accused must be *the* proximate cause or *a* proximate cause. That controversy was resolved by this Court in *People v Tims*,[33] but review of the principles is instructive here.

The common-law causation element is comprised of two components, cause-in-fact and proximate or legal cause.[34] In the law, and most particularly for purposes here the criminal law, "proximate cause" simply means a "cause of which the law will take notice."[35] As this court has observed, "[T]he phrase 'the proximate cause' is a legal colloquialism," and does "not imply that a defendant is responsible for harm only when his act is the sole antecedent."[36] Black's Law Dictionary states that "an injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act

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[33] *People v. Tims*, 449 Mich 83 (1995).

[34] *People v. Tims*, at 95.

[35] Perkins, *Criminal Law*, Chapter 6, § 9(C), p.690.

[36] *Tims*, at 96.

or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."[37] This definition is well-supported in the treatises.

The concept of proximate or legal cause is not employed to limit responsibility to acts which cause a particular injury or damage without the possible interplay of any other force in actual fact, as this would be absurd. For example, if an employee is sent to make a delivery, and is murdered along the way, the murderer is not relieved of responsibility because but for the action of the employer in sending the employee on the errand the murder would not have occurred; by the same token, the employer is obviously not responsible for (not the legal cause of) the death of the employee by having sent him on the errand. As Perkins notes, the maxim *"In jure non remota causa sed proxima spectatur* (in law not the remote cause but the proximate cause is regarded)" expresses the point.[38] The question actually, then, is to find the line of demarcation between causes of which the law will take notice and those which will be regarded as remote, and which the law consequently will not notice. This has always been the law. Sir James Stephen, in his work *A History of the Criminal Law of England*, explains the law of homicide, observing that "[I]n order that a person may be killed by an act the connection between the act must be direct and distinct, and though not necessarily immediate it must not be too remote...Every effect is caused by

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[37] *Black's Law Dictionary*, at 1103 (emphasis supplied).

[38] Perkins, at 690.

every event of which it may be affirmed that if it had not happened the effect would not have been produced."[39] On the one hand, the law will not take note of a cause which played a part which was infinitesimal or essentially theoretical; on the other, the law will take notice of a cause which was a substantial factor in bringing about a certain result, as this court held in *Tims*.[40]

Ordinarily, the question of legal cause is rather straightforward. It is the unusual case, the out-of-the ordinary, which joins the issue, and these cases generally involve issues of transferred intent, intervening cause, concurrent cause, and the like. Cause-in-fact is not a cause the law will notice if the death that results is remote from the cause-in-fact, or if an intervening cause supersedes the cause-in-fact.[41] When crimes not involving specific intent

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[39] Sir James Stephen, *III A History of the Criminal Law of England* (MacMillan & Co, 1883), p. 3, 6. Stephen goes on to discuss intervening causes that are not superceding causes, such as refusal to seek treatment, and those that are, such as the intentional acts of third parties. See p. 6-9. Michigan law is consistent with the explication of the law in the treatises. See *People v Townsend*, 214 Mich 267 (1921); *People v Webb*, 163 Mich App 462 (1987) (if nonfatal wounds are inflicted, the failure of the deceased to procure proper treatment or take proper care of the wound will not terminate defendant's responsibility for the homicide, even though with proper care death would not have resulted); *People v Cook*, 39 Mich 236 (1878); *People v Vanderford*, 77 Mich App 370 (1977) (intervening medical negligence, even gross negligence, is not available as a defense to one who has inflicted a mortal wound on the victim); *People v Cook*, supra; *People v Townsend*, supra; *People v Flenon*, 42 Mich App 457 (1972); *People v Williams*, 107 Mich App 798 (1981) (rev'd on other grounds, 413 Mich 940)( even as to a *non-mortal* wound, a defendant is responsible for a homicide where the death is the result of erroneous or unskillful medical treatment unless the treatment amounted to grossly erroneous medical treatment–*ordinary* negligence causing death will *not* exculpate the defendant, even though without the negligent medical care the victim would not have died).

[40] And see Perkins, at 695.

[41] See Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 1995), p. 139, noting that a superseding cause is an intervening cause that breaks the chain of causation,

are involved (these issues not generally arising in assaultive crimes), the causation question is essentially one of foreseeability. For example, where an injury is caused recklessly, and death occurs from ordinary medical negligence, the accused remains the proximate or legal cause–that is, a substantial–cause of this forbidden result, and remains liable criminally, as was pointed out previously.[42] The issue often arising in recklessness or negligence cases, as Professor LaFave points out, is whether there is some factor which "intervenes between the defendant's conduct and the result," the issue being one of foreseeability. In an example taken from an actual case, LaFave illustrates the point: an individual recklessly fired a gun in the vicinity of a rowboat on a dangerous river, the rowboat being occupied by two people, one of whom jumped overboard in fright when the shot was fired near the rowboat causing the rowboat to capsize and the *other* occupant to drown; the defendant was held responsible for the death, because the conduct of jumping from the boat causing it to capsize leading to the death of the other occupant was a normal instinctive response to the conduct of the defendant.[43]

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and advising that "superseding cause" is the correct term, as "supervening cause" is often employed interchangeably with intervening cause. And see Stephen, supra, and 1 LaFave, *Substantive Criminal Law* § 6.4, Perkins, Chapter 6, § 9(C)(11).

[42] See also LaFave, § 6.4(g)(5).

[43] LaFave, § 6.4(g)(2), p. 491.

Again, the measure of proximate or legal cause is reasonable foreseeability of the injury which occurred from the conduct of the accused.[44] Certainly this *excludes* from criminal liability conduct which is a cause in fact, yet remote. For example, if an individual drives recklessly, so as to endanger pedestrians, and his manner of driving catches the attention of a window-washer, who is so intrigued that he fails to pay heed to what he is doing, loses his balance, and falls, then the defendant's driving, though a but-for cause of the fall of the window-washer, is not the proximate or legal cause of his injuries.

What of the claimed negligence of the victim as an intervening cause? As has been demonstrated, the failure to seek medical treatment is not an intervening cause, and the intervening negligence of third parties (e.g. doctors) is not an intervening cause. As stated by Perkins, "negligence on the part of the deceased may be considered by the judge, together with all the other facts, in fixing the *sentence* in a particular case, but it has no bearing upon either responsibility or imputability in the determination of guilt or innocence....a driver whose criminal negligence on the highway has been a substantial factor in a fatal traffic accident is the proximate cause of this result even if decedent was equally negligent at the wheel of the other vehicle...."[45] As nicely stated in Clark and Marshall, "Contributory negligence of a victim is foreign to a criminal prosecution where the proceeding is by the state to punish the wrongdoer for his violation of the law. On a prosecution for

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[44] Foreseeability is an objective test, and indeed, may be determined legislatively. See footnote 64 and accompanying text.

[45] Perkins, Chapter 6, § 9(C)(8)(emphasis supplied).

manslaughter by negligence, the defendant is punished because of his negligence, and to deter others, and it is no defense, therefore, that the person killed was guilty of negligence contributing to his death, *even though he would not have been killed if he had used due care.*"[46] In sum, "cause" or "causation" in the criminal law means that the act of the defendant is a cause-in-fact of the forbidden result (a but-for cause), and that the result is not remote from the cause; that is, is foreseeable (within the scope of the risk of harm as determined by the legislature). The chain of causation may be broken by an intervening cause that supersedes, but these acts are either intentional conduct or grossly negligent conduct that itself is a substantial cause of the result; ordinary negligence is viewed as to be anticipated by the actor. Below is a chart that illustrates these points as to a number of homicide statutes in Michigan.

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[46] Clark and Marshall, *Crimes*, § 5.18, p.373 (emphasis added).

**Chart**

| **Offense** | **Actus reus** | **Mental culpability** | **Cause-in-fact** | **Legal/ proximate cause** | **Intervening/ superseding cause** |
|---|---|---|---|---|---|
| Negligent homicide | Operation of motor vehicle | Negligence; failed to do what ordinary person would have done under the circumstances | But/for the negligent manner of operation of the vehicle | Foreseeable result (within scope of risk of harm) | Intentional or grossly negligent acts of 3rd party or victim* |
| Vehicular Manslaughter | Operation of motor vehicle | Gross negligence; failed to use care and diligence to avert threatened danger when to the ordinary person it must be apparent that the result is likely to prove disastrous to another. | But/for the grossly negligent manner of operation of the vehicle | Foreseeable result (within scope of risk of harm) | Intentional or grossly negligent acts of 3rd party or victim* |
| OUIL/impaired causing death | Operation of motor vehicle | Knowingly consumed; voluntarily decided to operate | But/for the operation of vehicle while intoxicated | Foreseeable result (within scope of risk of harm) | Intentional or grossly negligent acts of 3rd party or victim* |
| License suspended or revoked or no license | Operation of motor vehicle | Voluntarily decided to operate | But/for the operation of vehicle | Foreseeable result (within scope of risk of harm) | Intentional or grossly negligent acts of 3rd party or victim* |

*The intentional failure of the victim to seek treatment is not, however, a superseding cause.

Negligent homicide, then, is the operation of a motor vehicle without reasonable care under the circumstances, with death resulting from that negligent manner of operation in a reasonably foreseeable manner (within the scope of risk of harm as legislatively determined); the intentional or grossly negligent acts of a third party or the victim are not foreseeable, though the negligent acts of the victim or a third party are. Vehicular manslaughter is the operation of a motor vehicle without reasonable care when it was apparent under the circumstances that ordinary care was required to avoid seriously injuring another, with death resulting from that grossly negligent manner of operation in a reasonably foreseeable manner (within the scope of risk of harm as legislatively determined); the intentional or grossly negligent acts of a third party or the victim are not foreseeable, though the negligent acts of the victim or a third party are. OUIL causing death is the operation a motor vehicle after having knowingly consumed intoxicating substances to a point prohibited by law, with death resulting from that operation in a reasonably foreseeable manner (within the scope of risk of harm as legislatively determined); the intentional or grossly negligent acts of a third party or the victim are not foreseeable, though the negligent acts of the victim or a third party are.

**C. The Parsed Statute Applied**

In this case the defendant was driving while intoxicated, and the passenger in his vehicle was killed when the vehicle struck the curb and flipped over while exiting the freeway. An eyewitness said that defendant had been "tailgating" the witness's vehicle, then another vehicle, on the freeway before attempting to exit. A defense expert witness testified

that the exit ramp was safe for thirty mile per hour speeds and under, and that the curb was dangerous. He testified he would expect that since its completion of the curb in 1966 there would have been "a number of people who got into problems getting off the ramp and striking the curb and having problems," including rollovers.[47] He was not aware of earlier testimony from police officers that in at least the previous 21 years no one had rolled their vehicle on that exit.[48] He would have expected there had been some.[49] Rather than reading the standard instruction, CJI2d 15.11, the trial judge simply read the statute to the jury, to which defense counsel objected. When the jury asked for further instructions, the trial judge again read the statute; defense counsel objected.[50] The jury convicted; on the second count of manslaughter, the jury returned a verdict of negligent homicide.[51] The majority of the panel in the Court of Appeals reversed on the ground that the jury had not been told, as set out in the standard jury instruction, that it was required to find that "the defendant's *intoxicated* driving was a substantial cause of the victim's death." The court's instruction "thus failed to cover the causation element as set forth in *Lardie, supra* (and in CJI2d

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[47] 28A.

[48] 29A.

[49] 30A.

[50] 51A.

[51] The jury was instructed on the meaning of both gross negligence and ordinary negligence, and thus, by the negligent homicide verdict, found that the defendant negligently operated the motor vehicle, and in so doing caused the victim's death. See 35A-41A; 45-46A.

15.11)."[52] In the companion case, *People v Large*, the deceased child rode her bicycle out of her driveway and into the road, where the defendant's vehicle struck and killed her. He was driving while intoxicated, and was speeding; a prosecution expert testified that the defendant's vehicle would have struck the child inevitably even had he not been speeding. The Court of Appeals affirmed the refusal to bind over, finding that under *Lardie* that defendant's "*intoxicated driving* was not a substantial cause of the victim's death."[53] Both opinions are mistaken because *Lardie* is mistaken. In each case, the culpable act of the accused was the decision to operate a motor vehicle while intoxicated; in each the operation of the motor vehicle was a "cause-in-fact" or but-for cause of the death of the victim; in each that death was not remote from the operation of the vehicle (e.g. a sign-painter or overpass worker was not startled by defendant's driving so as to fall to his death, nor was the vehicle struck by lightning, causing the death of the passenger in the present case); in each a concurrent cause contributed to the death of the victim (indisputably in *Large*; as a contested matter in this case); and in each that concurrent cause was not a superseding cause, as in neither was the contributing factor the gross negligence or intentional conduct of a third party so as to amount to a superseding cause. Ordinary negligence–such as ordinary medical negligence in treating a nonfatal wound–is not a superseding cause. Indeed, in *People v*

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[52] 11A.

[53] *People v. Large*, 2004 WL 1779062, 3 (2004).

*Garner*[54] a child crossed the street in front of the defendant's vehicle, and the defendant, who was driving while intoxicated, was unable to avoid striking and killing her. Considering a statute similar to that in Michigan, the Colorado Supreme Court held that the "proximate cause element of the crime relates to a defendant's operation of a motor vehicle....There is no requirement under the current statute that the prosecution also prove that the defendant's driving was negligent.....[and] the victim's own act of running in front of the vehicle....[was] not an independent intervening cause....Simple negligence on the part of the victim 'is not, as a matter of law, an independent intervening cause.'"[55]

**Conclusions**

In answer to the court's first four questions in the grant of leave to appeal,[56] the "objectified intent"–the intent that a reasonable person would gather from the text of the law providing that "a person...who operates a motor vehicle in violation of subsection (1)[that is, while intoxicated as defined in the statute, meaning either under the influence, or with a specified blood-alcohol content] and by the operation of that motor vehicle causes the death

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[54] *People v Garner*, 781 P2d 87 (Co, 1989).

[55] *Garner*, at 90. At the most, then, a jury question regarding superseding cause may exist in *Large*, but certainly the case should go to trial.

[56] (1) whether the "substantial" cause language in *People v Lardie*, 452 Mich 231 (1995), is consistent with the statute; (2) whether MCL 257.625(4)'s requirement that the prosecutor establish that the defendant's "operation of that motor vehicle causes the death of another person" requires the prosecutor to establish that the defendant's operation of the motor vehicle was affected by his intoxicated state; (3) whether the statute obligates the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death; (4) whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted."

of another person is guilty of a felony"–is determined by ascertaining the generally understood meaning of ordinary terms as understood by the common mind according to general principles of English usage, and the meaning of legal terms of art as understood by those sophisticated in the law at the time of enactment. So understood:

- A violation of subsection (1)–driving while intoxicated–requires no proof that the manner of operation of the vehicle was affected by the intoxication, but only that the driver was either under the influence or had a blood-alcohol level of .08 or more.

- "Operation of that motor vehicle" means to perform the function of driving the motor vehicle; "operation of that motor vehicle in violation of subsection (1)" means to perform the function of driving while under the influence, or with the specified blood-alcohol content. No influence of the intoxicant on the manner of driving is suggested by the statute.

- "Causation" is a legal term of art; one causes a result in the law when the cause is one of which the law will take notice (the legal or proximate cause). A legal or proximate cause (also called a substantial cause) exists when the act is a cause-in-fact or but/for cause of the result, and that result is not connected only remotely to the cause; that is, is reasonably foreseeable (within the scope of risk of harm as legislatively determined).

- Causation may be broken by a intervening cause that is, in the law, viewed as superseding. The ordinary negligence of the victim or a third party is not a superseding cause as a matter of law.

And it must be remembered that, as Justice Scalia observed, the task of construction includes context–what a "reasonable person would gather from the text of the law, placed

alongside the remainder of the *corpus juris*." Our legislature has enacted a statute that closely parallels MCL 257.625 in MCL 257.904. Subsection (1) of 257.904 prohibits the operation of a motor vehicle by one whose license has been suspended or revoked (if the proper notice has been given), or if that person has not been licensed at all. Subsection (4) provides that "person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony." If *Lardie* is correct that for violation of MCL 257.625(4) the intoxication must affect the manner of driving (though only in some inexplicable way that does not cause the driving to be even negligent), then it follows that for violation of MCL 257.904(4) the fact of license suspension, revocation, or lack of license must be viewed as having affected the manner of driving. The prosecution must show, for example, a "suspended license manner of driving" just as the prosecution must show an "intoxicated manner of driving," though in neither case is it required that the prosecution show that this manner of driving was negligent in any way. This makes no sense. And the statutes should be viewed consistently; taking the ordinary term "operating" and the legal term "causation," one is guilty of these offenses if their operation of the motor vehicle *when that operation of the motor vehicle is prohibited because of a physical condition (intoxication) or legal condition (no valid license)* is the cause-in-fact of a death that is neither remote nor the result of a superseding cause.

The court in *Lardie* was correct that the offense here is not a strict liability offense, for "[W]here a statute requires a 'criminal mind' for some, but not all, of the elements of the

crime, the statute does not impose strict liability. Because the statute requires proof of a mens rea, it does not impose strict liability."[57] And the court was also correct that the statute requires that the defendant "acted knowingly in consuming an intoxicating liquor or a controlled substance, and acted voluntarily in deciding to drive after such consumption."[58] But though it is doubtless true that "[T]he Legislature sought to deter drivers who are 'willing to risk current penalties' from drinking and driving,"[59] the conclusion drawn in *Lardie* that "[I]n seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death" or else "the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted" is a *non sequitur*.[60] Keeping intoxicated drivers *off the road*, where the law prohibits them from being, advances

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[57] *Lardie,* at 255, quoting *People v Quinn*, 440 Mich 178 (1992).

[58] *Lardie,* at 255.

[59] *Lardie*, at 257, citing the legislative analysis of 1991 P.A. 98. *Lardie* incorrectly refers to the legislative determination that driving while intoxicated is so inherently dangerous and so antisocial–particularly given the evidence on the point regarding injuries and fatalities–that the *fact* of driving when prohibited by the OUIL laws is sufficient to assign responsibility for any death caused, where that death is not remote and no superseding cause intervenes, as an "irrebuttable presumption of gross negligence from the wrongful act." *Lardie*, at 252. Irrebuttable presumptions are unknown to the law of evidence; presumptions assign burdens of going forward and burdens of persuasion. An "irrebuttable presumption" is simply a rule of law. *Amerada Petroleum Corp. v. 1010.61 Acres of Land, More or Less, Situate in Harris County, Tex.*, 146 F2d 99, 102 (CA 5 1945). Without regard to whether it amounts to gross negligence or is its equivalent, the wrongful act that must cause death under MCL 257.625 is driving while intoxicated, not driving in an intoxicated manner.

[60] *Lardie*, at 257.

traffic safety and prevents those drivers from causing deaths. The statute was "designed to protect the public from a particular type of *risk* and harm...."[61] If the driver had been observing the law he would not have been on the road, and the death would not have occurred; the driver is thus responsible unless the death is remote from the operation of the vehicle, or a superseding cause intervenes.

This court has also asked whether, if the statute is construed as the People argue, a violation of equal protection occurs. No such claim was advanced below, and it is difficult to conceive the manner in which equal protection concerns would arise. Perhaps an argument could be advanced that equal protection concerns are implicated because the statute punishes more severely persons who have engaged in the wrongful conduct (driving while intoxicated) depending on the consequences that flow from that conduct; that is, where the operation of the vehicle in even a non-negligent manner causes death (and not remotely, and no superseding cause intervenes) the driver is guilty of a serious felony, but if no death (or serious injury)[62] occurs, the offense would be relatively minor (unless it was a repeat offense) —and indeed, no penalty would result at all unless the driving while intoxicated was discovered by the police. But the law has always punished consequences flowing from a wrongful act or state of mind more seriously than if those consequences had

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[61] *State v Caibaiosai*, supra, at 576.

[62] MCL 257.625(5).

not occurred.[63] One who assaults with intent to murder but fails to kill his victim may have the same mental state, and engage in the same conduct, as one whose victim dies, but in the latter case the perpetrator is treated more severely by the law because of the consequences of his conduct. As Justice Holmes said long ago, in language particularly apt with regard to the statute at issue here:

> ...it is to be remembered that the object of the law is to prevent human life being endangered or taken; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, *and not merely to restrain them from evil inclinations*, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law.
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> *****
>
> Now, if experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, *or if on any other ground of policy it is deemed desirable to make special efforts*

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[63] See e.g. *State v Hubbard*, 751So.2d 552, 557-562 (1999) (Given...that the operation of a motor vehicle while intoxicated is a reckless (and therefore culpable) act, is it rational for the legislature to impose criminal sanctions for any death which occurs....[The statute] requires that the prosecution prove...a causal connection between the defendant's unlawful conduct, operation of a motor vehicle while intoxicated, and the victim's death. The statute does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death....Th legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death....the legislature has the prerogative to define or redefine the elements of a crime."

> *for the prevention of such deaths*, the lawmaker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, *the legislator apprehends*.[64]

The matter here is one of social policy, within the authority of the legislature.[65] There is no constitutional impediment to the legislative action here.

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[64] Oliver Wendell Holmes, *The Common Law*, (Little, Brown, & Co., 1881), p. 56-57, 59.

[65] See *Mays v City of East St. Louis*, 123 F3d 999, 1001 (CA 7, 1997)("In a democracy, the people (through the political branches of government) may resolve hard questions as well as easy ones") (abrogated on other grounds, *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

## Relief

WHEREFORE, the People request that Court of Appeals be reversed and the conviction reinstated.

Respectfully submitted,

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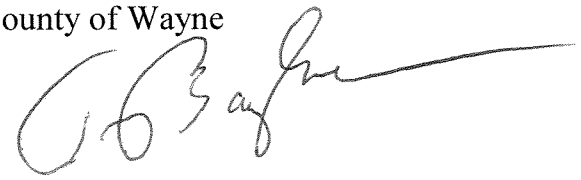

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